88-1456

No.

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT J. IPPOLITO, JUDY IPPOLITO, WAYNE A. GERENSTEIN, NANCY M. GERENSTEIN, MICHAEL J. GOODMAN and PEGGY GOODMAN,

Petitioners,

v.

WNS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WAYNE B. GIAMPIETRO
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 236-0606/332-6000

Attorneys for Petitioners

March 3, 1989

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. May one requesting personal financial information about a consumer avoid liability under the Fair Credit Reporting Act, 15 U.S.C. § 1681a *et seq.*, by labelling such a request a business request, even though he has no legitimate business purpose for requesting that information?

2. May one requesting personal financial information about a consumer avoid liability under the Fair Credit Reporting Act, 15 U.S.C. § 1681a *et seq.*, by claiming that he was ignorant of his obligations under that Act?

LIST OF ALL PARTIES IN THE COURT OF APPEALS

Plaintiffs-Appellees, Cross-Appellants (Petitioners in this Court):

Vincent J. Ippolito
Judy Ippolito
Wayne A. Gerenstein
Nancy M. Gerenstein
Michael J. Goodman
Peggy Goodman

Defendant-Appellant (Respondent in this Court):

WNS, Inc.

Defendant-Cross-Appellee (not a party before this Court):

Equifax Services, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE:	
I. NATURE OF THE CASE	6
II. STATEMENT OF RELEVANT FACTS	6
REASONS FOR GRANTING THE WRIT:	
Summary Of Argument	12
I.	
THE COURT OF APPEALS HAS DEVISED AN IMPROPERLY NARROW DEFINITION OF "CONSUMER REPORT" UNDER THE FAIR CREDIT REPORTING ACT AT ODDS WITH THE DECISIONS OF ALL OTHER CIRCUITS	13
II.	
RESPONDENTS' IGNORANCE OF THE LAW DOES NOT EXCUSE THEIR WRONGFUL CONDUCT	21
CONCLUSION	23

APPENDIX

A— Opinion and Judgment Order, United States Court of Appeals for the Seventh Circuit (December 5, 1988), reported at 864 F.2d 440 (7th Cir. 1988) A-1

B— Opinion, United States District Court, denying Defendants' Motion to Dismiss Complaint (June 30, 1986), 636 F. Supp. 471 (N.D. Ill. 1986) ... B-1

TABLE OF AUTHORITIES

Cases	Page
Belshaw v. Credit Bureau of Prescott, 392 F. Supp. 1356 (D. Ariz. 1975)	13
Boothe v. TRW Credit Data, 557 F. Supp. 66 (S.D. N.Y. 1982)	16
Greenway v. Information Dynamics, Ltd., 399 F. Supp. 1092 (D. Ariz. 1974)	16
Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978)	17, 18
Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980)	17, 18
Houghton v. New Jersey Manufacturers Insurance Company, 795 F.2d 1144 (3d Cir. 1986)	18
Hovater v. Equifax, Inc., 823 F.2d 413 (11th Cir. 1987)	18
Kennedy v. Border City Savings & Loan Association, 747 F.2d 367 (6th Cir. 1984)	20
North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925)	22
Rice v. Montgomery Ward & Co., Inc., 450 F. Supp. 668 (M.D. N.C. 1978)	16
Russell v. Shelter Financial Services, 604 F. Supp. 201 (W.D. Mo. 1984)	16
Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982)	22
Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987)	18

Statutes

15 U.S.C. § 1681a 2, 14, 16
15 U.S.C. § 1681b 4, 13, 14
15 U.S.C. § 1681n 5, 13, 20
15 U.S.C. § 1681o 5, 13
15 U.S.C. § 1681q 5, 13, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT J. IPPOLITO, JUDY IPPOLITO, WAYNE A. GERENSTEIN, NANCY M. GERENSTEIN, MICHAEL J. GOODMAN and PEGGY GOODMAN,

Petitioners,

v.

WNS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 5, 1988.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 864 F.2d 440, and is reproduced in the Appendix. The opinion of the District Court for the Northern District of Illi-

nois, Eastern Division, denying Respondent's Motion to Dismiss the Complaint, issued prior to the trial of this cause to a jury, is reported at 636 F. Supp. 471 (N.D. Ill. 1986), and is also included in the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit were entered on December 5, 1988. No petition for rehearing was filed. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1681a

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of

living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and

officer of another local union, Local 320, also affiliated with the IUOE. This case arises out of disciplinary action which Local 660 took against Hester.

The International's Constitution, with which all members of the IUOE agree to comply upon becoming members of an IUOE local and of the IUOE, prohibits members of one IUOE local union from working within the jurisdiction of another IUOE local without obtaining that local's consent. In August, 1983, Hester accepted a job with the Tennessee Valley Authority to which Local 660 had referred another individual; although the job was within the Local's jurisdiction, Hester did not seek or obtain the consent of the Local before accepting that job.

On September 15, 1983, the President of Local 660 filed internal union disciplinary charges against Hester. The charge alleged that by "seeking and accepting employment . . . in the jurisdiction of Local 660 without consent on or about August 20, 1983" Hester had violated Article XV, Section 3(a) of the IUOE Constitution.[1]

On October 7, 1983, Hester sent a letter to Local 660 asserting that "[t]he charges against me are improper under Section 101(a)(5) of the Landrum-Griffin Act because they lack specificity and it is impossible to prepare a defense to such unintelligible charges." Hester's letter went on to claim that he had a "right[] under the [collective bargaining] contract" to accept the job in question. Hester's letter was drafted by a lawyer Hester had retained for these purposes.

---

[1] Art. XV, Sec. 3(a) of the IUOE Constitution provides, in relevant part, that: "Members of one Local Union shall not seek employment, be employed, or remain at work at the craft within the territorial jurisdiction of another Local Union without the consent of such other Local Union, which consent may be evidenced by its acceptance of the clearance card presented to it by the member involved, as provided in the Constition, or by the issuance of the service dues receipt hereinafter described".

On November 8, 1983, Local 660 held a trial on the charges against Hester. Hester chose not to participate in that trial. Based on the evidence presented, Hester was found guilty as charged and was fined $3,000.

Article XVII, Section 1(a) of the IUOE Constitution establishes an internal union appeal procedure by which a member may appeal to the International's General Executive Board from any action by any IUOE local union adverse to the member. Upon receiving the appeal and the local union's response, the matter is referred to a panel of the General Executive Board; the panel makes a recommendation to the General Executive Board which renders a decision. Should the local or the member be dissatisfied with the General Executive Board's decision, either may appeal from that decision to the International's General Convention which is held quadrennially.

Upon learning of the discipline imposed upon him by Local 660, Hester chose to exercise his appeal right under the IUOE Constitution. Pending the resolution of the appeal, the International's General President stayed payment of the fine.

The panel of the General Executive Board to whom the case was assigned found that the charges that had been filed against Hester were sufficiently specific to allow Hester to prepare his defense, that Hester was guilty of violating the Constitution, but that the fine was excessive and should be reduced to $500. By letter dated August 6, 1984, Hester was notified that the General Executive Board had adopted the recommendation of the panel.

On November 7, 1984, more than one year after Hester had claimed that Local 660 was proceeding against him in violation of law and exactly one year after he was informed of the Local's disciplinary action, Hester instituted this action in federal court. He named as defendants both Local 660 and the IUOE. Hester's com-

plaint alleged that by disciplining him, the Local had violated his rights under § 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("LMRDA"), and that by affirming that discipline the International also had violated LMRDA § 101(a)(5).[2] The complaint further charged the International and the Local with breach of the duty of fair representation.[3]

Local 660 and the IUOE each moved separately to dismiss the charges based on the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). The district court, *sua sponte*, decided it did not have jurisdiction over Hester's claims and dismissed them without reaching the unions' statute of limitations arguments.

On appeal, a panel of the Eleventh Circuit reversed the district court's decision with respect to jurisdiction and went on to address the statute of limitations arguments. The court of appeals first unanimously held, in accordance with its prior decision in *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 474 U.S. 1057, that NLRA § 10(b)'s six-month statute of limitations applies to LMRDA claims such as those alleged by Hester. But the majority of the panel (Tuttle and Kravitch, JJ) went on to rule that in order to "permit[] a union member to seek relief through union grievance procedures without foreclosing his or her right to sue in the event these procedures prove ineffective," the statute of limita-

---

[2] After the International General Executive Board issued its decision on the appeal, Local 320, the Local to which Hester belonged, informed Hester that, until he paid the fine, it would not accept his dues and would suspend his membership for non-payment of dues. Based on that action, Hester sued Local 320 as well alleging a further violation of § 101(a)(5).

[3] Hester later amended his complaint to add a pendent Alabama state claim.

tions should be tolled until "the point where the grievance procedure [*viz.*, the internal union appeals procedure] was exhausted or otherwise broke down to the employee's disadvantage." Pet. App. 23a. Because Hester commenced suit within three months of that time the majority found Hester's complaint to be timely.

This conclusion drew a lengthy dissent from Judge Tjoflat. He reasoned that plaintiff's complaint alleged "discrete LMRDA violations" by Local 660 and the International and that the "statute of limitations began to run as to each of these defendants on the day Hester received notice of its LMRDA violation." *Id.* 34a, 35a. Because Hester "had concluded" as of October 7, 1983, "that Local 660 was proceeding against him in violation of LMRDA's bill of rights," Judge Tjoflat reasoned, "[o]n that date, he had an absolute right to file suit in the district court against Local 660." *Id.* at 34a. As "Hester did not bring suit against Local 660 . . . until . . . well after the six-month statute of limitations had run, Hester's federal claim against Local 660 is . . . time-barred." *Id.* at 36a.

Judge Tjoflat sharply criticized the majority's contrary conclusion, reasoning as follows:

> The majority has created a strange scheme: if the union member who has been wronged by his union does not file suit in district court before exhaustion of internal remedies, his cause of action does not accrue, and the limitations period does not begin to run, until exhaustion. On the other hand, under the majority's theory, if the union member who has been wronged by his union does file suit in district court before exhaustion of internal remedies, his cause of action has accrued, and, under appropriate circumstances, the district court can decide the case. I cannot imagine that Congress intended this non sequitur. Moreover, I do not see how the majority's scheme is consistent with any policy underlying our federal labor laws. [Pet. App. 40a]

REASONS FOR GRANTING THE WRIT

This Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), holding that NLRA § 10(b) supplies the limitations period for a "hybrid § 301/fair representation" claim, has generated a series of important, interrelated questions concerning the limitations period for the multitude of federal labor law causes of action. The court below in deciding one such question reached a result that is fundamentally inconsistent with the decisions of this Court, and of other courts of appeals, and contrary to the national labor policy. For these reasons, which we develop in detail below, the decision below warrants review by this Court.

A. In *DelCostello*, this Court held that in determining the limitations period for a federal cause of action for which Congress has not enacted an express statute of limitations, the federal courts should "not hesitate[] to turn away from state law" where "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake, and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." 462 U.S. at 172. Following that approach, the *DelCostello* Court "borrowed" NLRA § 10(b) as the appropriate limitations period for a "hybrid § 301/fair representation claim," 462 U.S. at 165, *viz.*, "a claim [under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185] that the employer had breached a provision of a collective bargaining agreement and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings," *id.* at 154. The Court reasoned that: the hybrid action "has no close analogy in ordinary state laws," *id.* at 165; application of a long state-law limitations period would "preclude the relatively rapid resolution of labor disputes favored by federal law," *id.* at 168; and that § 10(b) provides a "federal statute of limitations actually designed to accommodate a balance of interests

very similar to that at stake" in hybrid lawsuits and therefore "more apt than any of the suggested state-law parallels," *id.* at 169.

Since *DelCostello*, the threshold question the lower federal courts have confronted in cases brought under the LMRDA has been whether to "borrow" § 10(b) for such claims. Seven of the circuits—including the court below—have answered that question in the affirmative, at least with respect to LMRDA actions like the one here which involves claims that are related to employment rights;[4] one of those circuits (the First), joined by the Second Circuit, has reached a contrary conclusion with respect to LMRDA claims that are *not* related to employment rights.[5]

The choice of a limitations period generates a second, closely related threshold question: under what circumstances is the limitations period for filing LMRDA claims tolled. The resolution of that question is no less important than the choice of a limitations period in determining the timeliness of LMRDA suits, because "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application," and "[a]ny period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975). And if, as the courts of appeals have

---

[4] *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Reed v. United Transp. Unions*, 828 F.2d 1066 (4th Cir. 1987); *Adkins v. Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Clift v. UAW*, 818 F.2d 623 (9th Cir. 1987); *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 474 U.S. 1057.

[5] *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986); *Rodonich v. House Wreckers Union, Local 95*, 817 F.2d 967 (2d Cir. 1987).

unanimously concluded, federal law—specifically, NLRA § 10(b)—provides the limitations period for at least some types of LMRDA claims, the tolling issue stated above must be answered as a matter of *federal* law as well. *See Chardon v. Fumero Soto*, 462 U.S. 650, 660-61 (1983); *cf. West v. Conrail*, —— U.S. ——, 55 L.W. 4466 (April 6, 1987).[6]

As we proceed to show, the court below, while correctly recognizing that the tolling question is a federal question, gave an answer that is at war with the prior decisions of this Court, as well as with the national labor policy.[7]

---

[6] If, contrary to the holding of the court below and of the other courts of appeals to consider the question, a state statute of limitations were properly "borrowed" here, "this 'borrowing' logically [would] include[] rules of tolling" as well, at least so long as the state tolling rule were not " 'inconsistent' with federal law," *Board of Regents v. Tomanio*, 446 U.S. 478, 485-86 (1980); *see Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Johnson v. Railway Express Agency, supra*, 421 U.S. at 463-64. This is true because "[i]n borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereon, on the prosecution of a closely analogous claim." *Johnson, supra*, 421 U.S. at 465.

[7] The question whether state law or federal law provides the appropriate limitations period for LMRDA claims like the instant one which implicate the plaintiffs' employment rights is raised by the pending petition for certiorari in *Clift v. Auto Workers*, Sup. Ct. No. 87-42; the Solicitor General has urged this Court to issue a writ of certiorari in *Clift*.

Because the tolling issue raised in this case depends upon the applicability of a federal statute of limitations, *see* n.6 *supra*, if this Court were to grant the petition in *Clift*, we would urge the Court to hold the instant petition pending the outcome of that case. If the Court were to affirm the Seventh Circuit's application of § 10(b) in *Clift*, the tolling question presented here would then merit plenary consideration for the reasons set forth in this petition; if the Court were to hold § 10(b) inapplicable, the instant case would appropriately be remanded to the Eleventh Circuit for reconsideration of the limitations and tolling issues.

B. (1) The starting point for analysis is the fact that, as the court below tacitly acknowledged, *see* Pet. App. 18a-19a & n.24, plaintiff commenced this action *more than six months after his cause of action against Local 660 accrued.* By October 7, 1983, plaintiff had concluded that the Local was proceeding against him in violation of the LMRDA and plaintiff wrote a letter to the Local (drafted by the counsel he had by that time retained) so stating. On November 8, 1983, the Local found plaintiff guilty of the charges that had been proffered against him and imposed a fine upon him; if the Local violated plaintiff's rights under LMRDA § 101 (a) (5)—which establishes basic procedural conditions regarding notice and hearing that a union must satisfy *before* the union may discipline a member—that violation necessarily occurred no later than as of the time of the discipline. Indeed, in the instant case, the Local's involvement ended completely as of November 8, 1983, when the fine was imposed.[8] Yet plaintiff did not com-

---

[8] To be sure, the *International Union's* review of the Local's action did not conclude until August, 1984, three months before plaintiff commenced this action. But the International's review of the matter did not prevent plaintiff's action from accruing against the *Local.*

Under the LMRDA—as under the law of labor relations generally, *cf. Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212 (1979)—a local is itself a labor organization which is obligated to comply with the Act and which can be held liable for its own conduct. *See* LMRDA §§ 3(i), 102, 29 U.S.C. §§ 402(i), 412 (defining labor organization" for purposes of the LMRDA and creating cause of action for breach of Title I). Indeed plaintiff himself has recognized the fact that the local is responsible for its own action by suing the Local separately from the IUOE. *See also Shimman v. Frank,* 625 F.2d 80, 97-98 (6th Cir. 1980), where the court concluded that "it is clear from the International Union of Operating Engineers' Constitution which defines the relationship between th[at] International and its affiliated locals" that the "international union is a separate body from the local" and that IUOE locals enjoy "substantial autonomy in handling [their] own affairs" including the power to "elect their own officers, pass their own by-laws, transact business and *discipline members.*" (emphasis added).

mence this action until November 7, 1984, *one year after* the disciplinary action was taken and thirteen months after plaintiff had concluded that his LMRDA rights were being violated. Thus, absent some tolling, plaintiff's claim against the Local is barred by § 10(b).[9]

(2) The question presented here, then, is whether, as the court below held, an LMRDA plaintiff's delay in filing his claim is excused on the ground that, rather than proceeding directly to court to challenge under § 101(a)(5) a local union's action in disciplining him, the putative plaintiff instead chooses to seek relief from the local's action by invoking an "appeals" procedure created by the international union with which the local is affiliated. This Court has never addressed that issue. But the Court has considered analogous questions under other remedial schemes, and the decision below cannot be squared with this Court's rulings in these closely analogous cases.

The seminal case in this line is *Johnson v. Railway Express Agency*, *supra*, in which the Court concluded that the filing of a charge of an unlawful employment practice under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e-1 *et seq.*, does *not* toll the running of the statute of limitations for a claim under 42 U.S.C. § 1981. While acknowledging that "it is . . . almost to

---

[9] In the court below plaintiff argued that because the International stayed plaintiff's fine, the cause of action against the Local did not accrue until after the International ruled on plaintiff's appeal. But the International did not grant a stay until December 9, 1983, one month *after* the Local had completed its action; thus, whatever relevance the stay may have on the tolling issue discussed in text, the stay could not have prevented the cause of action from accruing as of November 8th. Moreover, plaintiff's argument ignores the fact that in determining when a cause of action accrues, "the proper focus is on the time of the [wrongful] act, not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (emphasis deleted); *see Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980).

be expected that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding," the Court explained that

> the fundamental answer to [this] argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his § 1981 rights. The fact that his slumber may have been induced by his faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. [421 U.S. at 465-66]

In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court applied the principle of *Johnson v. Railway Express* in contexts quite close to the instant case. In *Robbins & Myers*, the Court held that the filing of a grievance under a collective bargaining agreement alleging a breach of that agreement does *not* toll the statute of limitations for filing a claim that the employer's challenged conduct violated Title VII; the Court explained that "petitioner Guy in the grievance procedure was not asserting the same statutory claim in a different forum . . . but was asserting an independent claim based on a *contract* right." 429 U.S. at 238 (emphasis in original).[10] And in *Ricks* the Court held that

---

[10] In *Board of Regents v. Tomanio, supra*, the Court—in the course of holding that the filing of a state-court administrative review proceeding did not toll the statute of limitations for challenging the state administrative action under 42 U.S.C. § 1983—explained

a college professor who was denied tenure and who filed a grievance over that decision within the college's internally established appeals procedure was required to file a Title VII claim at the same time if the professor wished to preserve his statutory rights. The Court reasoned:

> [W]e already have held the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period [citing *Robbins & Myers*]. The existence of careful procedures to assure fairness in tenure decisions should not obscure the principle that limitations periods normally commence when the employer's decision is made. [449 U.S. at 261]

The decision below cannot be squared with the line of cases from *Johnson* to *Ricks*. The court below stated that it would "construe the section 10(b) limitations rule in a manner that permits a union member to exhaust available internal remedies without foreclosing his or her rights, in the event that this remedy proves ineffective, to seek relief in federal court." Pet. App. 20a. But the "internal remedies" to which the lower court referred exist to adjudicate *contractual* rights stated in the International's Constitution which is, of course, an enforceable contract, *see Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 619-22 (1981). Those rights, like the contractual rights involved in *Robbins & Myers* or the quasi-contractual rights involved in *Ricks* are "separate from and independent of" plaintiff's *public*

Robbins & Myers in the following terms: "we held . . . that it would not be inconsistent with Title VII to decline to toll the statute of limitations during labor grievance or arbitration procedures because 'contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII "have legally independent origins and are equally available to the aggrieved employee." '". *Board of Regents v. Tomanio, supra*, 446 U.S. at 490.

law rights under the LMRDA, *Johnson*, *supra*, 421 U.S. at 465. Section 103 of the LMRDA, 29 U.S.C. § 413, itself states that "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization . . . under the constitution and bylaws of any labor organization." And there is no doubt that the International, in resolving an appeal from a local's disciplinary action, is not authorized to decide, and does not purport to decide, whether the local violated the LMRDA; rather, the International applies a body of *internal union law* in deciding these cases.

Because that is so, the decision below flies in the teeth of *Johnson* and its progeny. The lesson of those cases is that "when Congress intended to establish a remedy separate and independent from other remedies that might also be available," there is no basis for tolling the various limitations periods so as to "allow a plaintiff to litigate such alternative claims in succession." *Board of Regents v. Tomanio*, *supra*, 446 U.S. at 489. As the First Circuit recently put it, courts are not to "invoke tolling in circumstances where a claimant rides parallel horses in search of relief." *Arriaga-Zayas v. ILGWU*, 835 F.2d 11, 13 (1st Cir. 1987).[11] By permitting the plaintiff to do so here—in the lower court's words, by permitting a would-be-plaintiff first to invoke his contractual rights under a union's constitution, and "in the event that this remedy proves ineffective, to seek relief in federal court." Pet. App. 20a.—the court below rendered a decision which is inconsistent with this Court's rulings and with those lower court cases (like *Arriaga-Zayas*) which have faithfully followed those rulings.[12]

---

[11] *See also Kolomick v. Steelworkers*, 762 F.2d 354, 355-57 (4th Cir. 1985); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied*, 467 U.S. 1253.

[12] It might be argued that because LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4), states that a union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four

(3) Significantly, the court below did not even cite, let alone discuss, *Johnson* and its progeny, even though they were heavily relied on by the Unions in their briefs to that court.[13] Instead, that court based its decision principally upon a supposed analogy to hybrid § 301/fair

---

month lapse of time)," *Johnson* and its progeny are distinguishable on the ground that those cases involved the use of *voluntary* rather than compulsory alternative remedies. In *NLRB* v. *Marine Workers*, 391 U.S. 418, 426 (1968), however, this Court concluded that § 101(a)(4) does not impose an exhaustion *requirement* but merely permits the courts "in their discretion [to] stay their hands for four months while the aggrieved person seeks relief within the union." *See also* Pet. App. 19a n.24 (majority opinion); *id.* 36a n.14 (Tjoflat, J., dissenting) & cases cited therein. *Marine Workers* thus does not leave room for an argument that would distinguish independent internal union remedies from the other types of independent remedies this Court has considered.

In any event, in the instant case even if the statute of limitations were tolled for the four months *after* the Local completed its disciplinary proceeding—the maximum exhaustion period under § 101(a)(4)—the claim against the Local still would be untimely as the complaint was not filed until one year after the Local completed the disciplinary proceeding. Only if the statute were tolled for the entire period during which plaintiff was pursuing his internal remedies would the claim be timely under § 10(b).

[13] In *Dunleavy v. Steelworkers Local 1617*, 814 F.2d 1087, 1091 n.2 (6th Cir. 1987), the Sixth Circuit, in a decision on which the court below heavily relied, found "the cited civil rights cases are inapposite because of the unique policy behind the LMRDA in favor of resolving internal [labor union] disputes." But the policy of resolving internal union disputes internally is by no means unique. In *Robbins & Myers*, the Court required the plaintiff to proceed directly to court notwithstanding the strong federal policy, embodied in 29 U.S.C. § 203(d), favoring the use of arbitration to resolve disputes under collective bargaining agreements, *cf. Maddox v. Republic Steel Corp.*, 379 U.S. 650 (1965). And in *Ricks* the Court refused to toll the limitations period pending the outcome of the University's internal appeals procedure notwithstanding what the Court subsequently has termed "[c]onsiderations of profound importance [which] counsel restrained judicial review of the substance of academic decisions," *Regents of the University of Michigan v. Ewing*, —— U.S. ——, 54 L.W. 4055, 4058 (Dec. 12, 1985).

representation litigation. Proceeding from the premise that in hybrid suits, a putative plaintiff need not commence his action until "'the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage,'" the court of appeals concluded that it could "find no sufficient reason" for deviating from that rule in the LMRDA context. Pet. App. 18a. That conclusion overlooks the fact that "[t]he contractual [grievance] procedures" at issue in a hybrid lawsuit "are significantly different from the . . . *internal* union procedures" involved here. *Clayton v. Automobile Workers*, 451 U.S. 679, 686 (1981) (emphasis added).

It is, of course, true, that in the context of hybrid suits, a would-be-plaintiff is required to invoke the contractual grievance procedure before the plaintiff may sue his employer. *Maddox v. Republic Steel Corp.*, *supra*. But it is also true that in the hybrid context, the employee may not sue his employer (or union) unless the grievance procedure "has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 569 (1976). Thus in the hybrid context—unlike the LMRDA context—the putative plaintiff does *not* have two separate and independent remedies to pursue; rather, the plaintiff's *only* remedy, initially, is through the contractual grievance procedure, and a judicial remedy becomes available only if the grievance procedure "fundamentally malfunction[s]." Accordingly, the exhaustion rule that is applied in § 301/fair representation litigation is wholly inapposite to the LMRDA context.[14]

Indeed, if an analogy were to be drawn to hybrid litigation, it would be to those cases in which *after* the grievance procedure has been completed, an employee may challenge the union's conduct in prosecuting the

---

[14] Judge Tjoflat develops this point in greater detail in his dissenting opinion below, *see* Pet. App. at 26a-32a, 38a-39.

grievance either in a hybrid lawsuit or in an administrative proceeding before the National Labor Relations Board or a similar state agency. In those cases, several courts of appeals—most recently the First Circuit in *Arriaga-Zayas*—have held, in accordance with *Johnson v. Railway Express* and its progeny, that the statute of limitations for these alternative remedies runs simultaneously, and that the § 10(b) limitations period for hybrid claims is not tolled by the filing of unfair labor practice charges. *See also* cases cited n.11. The instant case cannot be meaningfully distinguished from these latter cases.

C. The conflict between the decision below and the decisions of this Court (and of the courts of appeals which have adhered to this Court's teachings) provides reason enough for this Court to grant a writ of certiorari in this case. There is, however, an additional reason which makes plenary review all the more appropriate in this case: the decision below, if left uncorrected, will produce results at war with the national labor policy.

Most international unions have created appeals procedures like the procedure contained in the IUOE Constitution and, most of these procedures—including the IUOE procedure itself—culminate in an appeal to the international union's convention. Under the decision below tolling continues until this entire process—including the convention appeal—is exhausted; indeed that is precisely what the Sixth Circuit held in *Dunleavy v. Steelworkers Local 1617*, *supra*, a decision on which the court below heavily relied, *see* Pet. App. at 21a-23a & n.26.

Under LMRDA § 401(a), 29 U.S.C. § 481(a), the most frequent interval at which an international union is *required* to hold a convention is once every five years. Given the expense of convening a convention many unions —again including the IUOE—do in fact hold conventions at four or five-year intervals. Thus, in practical terms,

the decision below (and the companion decision of the Sixth Circuit in *Dunleavy*) create up to a *five-year* tolling period for LMRDA claims.[15]

As this Court has observed several times, disposing of labor disputes "relatively rapidly" is one of the core aspects of the national labor policy. *See DelCostello v. Teamsters*, *supra*, 462 U.S. at 168-69 & cases cited therein. Indeed, it is that very policy that led this Court in *DelCostello* to apply the six-months statute of limitations contained in NLRA § 10(b) to hybrid § 301/fair representation claims, and that has led all seven circuits which have considered the question to apply the same limitations period to at least those LMRDA claims which implicate employment rights. *See* cases cited n.4. The decision below substantially thwarts that policy by creating such an expansive tolling procedure.[16]

---

[15] In a 1986 survey of unions affiliated with the AFL-CIO conducted by the Secretary-Treasurer of the AFL-CIO, 19 national unions reported holding conventions at five-year intervals; 24 unions reported holding conventions at four-year intervals; and 43 unions reported holding conventions at two or three year intervals. Only nine unions hold conventions as frequently as once a year.

[16] The majority below argued that deying tolling would "force union members to file fragmentary claims" and thereby result in "a waste of litigant and judicial resources." Pet. App. 22a n.27, 21a. That argument assumes that when an international union reviews a local's action pursuant to an internal appeals procedure, the international is obligated to assure that the local has obeyed public law, and that the international commits an independent violation of the LMRDA if the international allows a local's unlawful action to stand. We know of nothing in the language or the history of the LMRDA which would impose such a duty on internationals to police the conduct of their locals, and at least one appellate court has squarely rejected such an argument, stating that "it is an attempt to find an international union vicariously liable for mere inaction." *Shimman v. Frank*, *supra*, 625 F.2d at 99.

But even if the majority's fears of "fragmentary claims" were sound, the proper solution would be to allow *the courts*, in their discretion, to *stay* LMRDA suits against locals pending the outcome of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS W. CRAWFORD, JR.
409 North 21st Street
Birmingham, Ala. 35203
(205) 328-9576

DAVID SILBERMAN
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383

---

appeals within internationals, and *not*, as the court below concluded, to grant *putative plaintiffs* up to a five year period in which they have the option of deciding when to sue.